

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. ABU 143 of 2018**  
**(High Court No. HBC 211/88)**

**BETWEEN** : (1) **DOMINION AUTOPARTS & ACCESSORIES**  
(2) **RAHMAT ALI**  
*Plaintiffs / Appellants*

**AND** : **THE NEW INDIA ASSUARANCE CO. LTD.**  
*Defendant / Respondent*

**Coram** : Jitoko, VP  
Basnayake, JA  
Sharma, JA

**Counsel** : Mr. N. Padarath for the Appellants  
Mr. N. Kumar for the Respondent

**Date of Hearing** : 09 May 2023

**Date of Judgment** : 26 May 2023

**JUDGMENT**

**Jitoko, VP**

[1] I entirely agree with the judgment of Basnayake JA in this appeal. I do not have any further useful comments to make.

**Basnayake JA**

- [2] This is an appeal filed on 7 December 2018 to have the judgment of the learned High Court Judge dated 20 October 2018 set aside. (Judgment is at pgs. 427-445 of the Record of the High Court (RHC)). By this judgment the court has dismissed the plaintiff's claim without costs.
- [3] The 1<sup>st</sup> Plaintiff/Appellant (hereinafter referred to as the Plaintiff) is a limited liability company engaged in a spare parts business. The 2<sup>nd</sup> Plaintiff/Appellant (Plaintiff) had been the owner of the business and the building. The spare parts were stored in two places. His shop in town and in the bulk store attached to his residence. The Plaintiff owned two insurance policies. One is No. 622/31/7865/86 dated 17 March 1986. This is to cover the motor spare parts of the company against loss or damage by fire for a sum of \$140,000.00. Of this 60,000.00 was to cover the spare parts stored in bulk store attached to his house. \$80,000.00 was to cover the spare parts in the shop. The 2<sup>nd</sup> policy bearing No. 622/21/1447 dated 15 November 1985 was issued for the building and contents for a sum of \$95,650.00 against loss or damage by fire. Of this sum the building was insured for a sum of \$60,000.00 and the contents for \$35,650.00.
- [4] The Plaintiff avers that on 2 November 1986 the building was partly damaged by fire and consequently suffered a loss of \$50,000.00 for spare parts and \$16,000.00 to the premises. The Plaintiff states that the Defendant was notified of the loss and damage on 3 November 1986. The Defendant failed to pay. The Plaintiff claims a sum of \$66,000.00 together with interest at 13.5% from the Defendant.
- [5] The Defendant in a statement of Defence (pgs. 143-144) admits the policies and the fact that the premises were burnt on 2 November 1986. The Defendant also admits that the loss was notified by the Plaintiff. However the Defendant denied liability on the basis that the Plaintiff failed to disclose that the Fiji Insurance Company Limited declined to renew and refused to keep the Plaintiff indemnified. The Defendant claims that they are entitled to avoid the contract and to reject the Plaintiff's claim. The Defendant also states that the Plaintiff has submitted a false and fraudulently exaggerated claim or amount of loss.

## **Judgment**

- [6] The learned Judge first dealt with the defence case. The Defendant had called their insurance officer Mr. Avinesh Chand Rai who had been looking after the legal claims. The witness has produced marked a letter from one Jim Ash as evidence of previous declinations and/or refusals against the Plaintiff. The learned Judge said that the only witness for the defence was not in the employment of the Defendant at the time this report was made nor was he involved in the investigation. The maker of the report was not called and hence the contents of the document could not be admitted. Hence the document was rejected. The Defendant could not therefore prove the nondisclosures by the Plaintiff. No evidence was led for the Defendant with regard to the alleged exaggerations by the Plaintiff. The Defendant also made no submissions at the end of the case in support of the defence. As that was the only available evidence the learned Judge declined the defence.
- [7] The learned Judge thereafter considered the loss the Plaintiff had suffered. The learned Judge said that the Plaintiff did not adduce any evidence to prove their alleged special damages or liquidated damages. No evidence was adduced to prove the losses suffered due to fire. The learned Judge also said that no evidence has been adduced to prove even the losses considered as un-liquidated damages. The learned Judge thus dismissed the Plaintiff's case as well without costs. The Plaintiff appealed.

## **Analysis**

- [8] The Defendant admits that the premises was burnt on 2 November 1986 and he was notified of the loss. The Plaintiff claims in the statement of claim a sum of \$50,000.00 for spare parts and \$16,000.00 for the building on account of the loss caused due to a fire that occurred on 2 November 1986. The Defendant admits the two insurance policies and the ownership of the building (Statement of Defence at pgs. 147-148) and the fact that the premises were burnt or damaged by fire on 2 November 1986. Therefore the only remaining issue would be the extent of damage and the quantum of loss.
- [9] The Defendant raised issues with regard to non-disclosure of material facts; In that whether the Plaintiff has disclosed the fact that previously the Fiji Insurance Company Limited declined to renew the contracts and/or refused to indemnify. The Defendant also raised an

issue with regard to the Plaintiff having made a false and fraudulently exaggerated claim which would make the policy void and enable the Defendant to avoid payment. However the learned Judge has rejected the defences taken up by the Defendant due to lack of proof. No appeal has been made by the Defendant against these findings. At the hearing in court the learned counsel for the Defendant conceded that the only issue was with regard to loss and damages. Hence there is no dispute with regard to liability.

### **Proof of loss**

- [10] The Fire claim form dated 3 November 1986 ((pg. 15 of the Supplementary Record (SR)) has been lodged with a claim of \$66,000.00. Of this sum \$16,000.00 was claimed for the building on the policy No. 622/21/1447 and \$50,000.00 for spare parts on the policy No. 622/31/7865/86 (pg. 16). With the claim for spare parts the Plaintiff had submitted a separate form where details of the claim for property destroyed or damaged required to be filled (pg.17). The Plaintiff in the column requiring the description of property claimed for in detail, stated as follows:- “Stock of bulk store”. Other than that there was no description of items in detail given. On 4 November 1986 (pg. 26 of the SR) the Plaintiff by a letter addressed to the Manager of the Defendant requested for fire claim forms for “our stock” at bulk store. The Plaintiff also requested the Defendant to, *“come and examine before things removed from there for clearance. Police and fire brigade are also inform and inspected”*.
- [11] On 5 November 1986 on behalf of the Defendants by its Manager, Western Region sent a claim form with a request to complete and return (pg. 28 of the SR). This letter states that, “we depute M/s Toplis & Harding, Independent Adjusters to assess the loss”. The Plaintiff states that no one from the Defendant has ever visited the site. On behalf of the Plaintiff, the Plaintiff’s Solicitors wrote two letters to the Defendant. One on 10 February 1987 (pg. 18 SR). As there was no response a reminder was sent on 25 March 1987 (pg. 19 SR). The Defendant replied the second letter (pg. 20 SR) on 8 April 1987 stating that the “claims are receiving the attention of our investigators/assessors”.
- [12] On 11 June 2018 the Plaintiff (2<sup>nd</sup> Plaintiff) whilst giving evidence said that he started the business in 1975. He said the fire took place in the bulk store which was connected to the

house. One policy covered the bulk store and the spare parts in the shop. The other is the house and its contents. He said the Defendant did not meet him and no assessors ever came into the premises to see the damage caused. He said to this day the Defendant did not say anything regarding payment. He said his stock burnt down and did not have immediate stock to run the business.

- [13] Under cross-examination (I am mentioning what is material only in relation to loss) he said he does not have any accounts or books to show the damage. To a question with regard to the value of the spare parts he said he got materials in writing at that time. There were hurricanes and flooding and they were destroyed. He said he did not make a request from the Accountants to show the damage. The following questions were put to him (pg. 505):

*Mr. Kumar: Mr. Ali I put it to you that the damage sustained by you is less than \$50,000.00?*

*Mr. Ali: I know it because I work it out and we have stock card and everything so we know what is there and the amount is right. I'm pretty sure that the stock was there at what I claimed".*

*Mr. Kumar: Mr. Ali, I put it to you, you did not suffer any damage by the fire?*

*Mr. Ali: I did suffer my Lord.*

*In Re-examination by Mr. Padarath*

*Mr. Padarath: So when you lodged those documents, did you lodge any supporting documents with the forms...in 1986?*

*Mr. Ali: Yes my Lord.*

- [14] The Plaintiff filed this case to claim a sum of \$66000.00 from the Defendant under two insurance policies. One policy No. 622/21/1447 was for the building of the residence insured for \$60,000.00 and contents for \$35,650.00 totaling \$95, 650.00. The Plaintiff's claim for the building was \$16,000.00. No claim was made for the contents although there was a cover of \$35,000.00. The residence cover was for \$60,000.00. The claim of the Plaintiff is for \$16,000.00. The Plaintiff said that the residence and the bulk store were situated at the same place. As per the evidence of the Plaintiff his entire stores were burnt. That particular day happened to be Diwali where the devotees celebrate it with lighting

fireworks. Therefore these fires would have been a common site. It appears that there was not much of dispute with regard to the damage caused to the building.

- [15] Questions were put to the Plaintiff on the claim against \$50,000.00 which was for spare parts stored in the bulk store attached to the Plaintiff's residence on the other policy (No. 622/31/7865/86) which was for a sum of \$140,000.00. Of this sum \$80,000.00 was for the merchandise including motor spare parts lying in a shop. \$60,000.00 cover was for spare parts in the bulk store. The Plaintiff claims \$50,000.00 for the spare parts that got damaged due to a fire which was in the bulk store. The Defendant admits the fire.
- [16] The Plaintiff gave evidence in court in 2018, after 32 years since the incident. Under cross-examination it was suggested to the Plaintiff by the learned counsel appearing for the Defendant with regard to the damage caused to the spare parts that the loss sustained was less than \$50,000.00. This indicates an admission by the Defendant that the Plaintiff suffered some loss. Immediately after the fire the Plaintiff having informed the Defendant, claims forms were sent to the Plaintiff to complete and return which the Plaintiff did. According to the Plaintiff the police and the fire brigade visited the scene after being informed. They would have made notes of their observations. However there was no visit by the Defendant.
- [17] In processing a claim under a policy it is usual for the Insurer to get a valuation done through their Loss Adjustors of the loss suffered by the Insured. So the basic questions that would arise in an action on an insurance policy would be whether the Insurer is liable regarding the claim and secondly to what quantum of damages is he liable (**Jaswant Lal v The New India Assurance Company Limited** (CBV 3 of 2013) (26 March 2014)). It has been the practice for the insurer to visit the scene as early as possible which would enable them to get firsthand information as to the cause as well as the extent of the loss suffered. This is done to prevent false or exaggerated claims. The Defendant never suggested that he visited the scene. His conduct was either willful or negligent. If the Defendant willfully or negligently avoided a visit to the scene, how could he challenge the stance taken by the Plaintiff? The Plaintiff said that he did not have stock to continue his business as the bulk store was burnt. Of a \$60,000.00 cover he still claims \$50,000. The Defendant says that the loss was less. What is the basis to suggest either the amount is less or more?

- [18] Due to the delay in payment and having no response from the Defendant the Plaintiff had to seek legal assistance. Through a lawyer the Plaintiff had to remind the Defendant twice. It was only after the second reminder that the Defendant on 8 April 1987 in a reply stated that the claims are receiving attention of the Investigators and Assessors. However there was never an assessment done by the Defendant. There cannot be an assessment done without a physical examination with regard to the damage caused to the building. The Plaintiff claimed a sum of \$16,000.00 for the building when the insurance cover was for \$60,000.00. The Police and the Fire Brigade had visited the scene immediately after the fire.
- [19] The Plaintiff was not cross-examined over the claim of \$16,000.00. Although the Plaintiff had a cover for the contents of the building for \$35,650.00 the Plaintiff did not lodge a claim for the contents. The Defendant did not have any material to dispute the Plaintiff's claim for the building. There is no admissible evidence of any investigation done with regard to the damage caused. Chandra J held in **Jaswant Lal** (supra), "*It is usually seen in claims relating to fire damage or flood damage, a claimant is not able to establish his loss with exact precision by producing all documents necessary to justify the claim as very often such documents are not available after the occurrence of the calamity. What a claimant can do is to produce whatever evidence that is available to justify the claim. It is for this reason that in insurance claims, when the event is brought to the notice of the insurer and a claim made, that the Insurer inspects the premises where goods had been stored and effect a valuation of the damage through its agents or representatives usually referred to as Loss Adjustors to avoid fraudulent or aggravated claims* (paragraph 32).
- [20] With regard to proving the quantum of loss the only evidence that was available in **Jaswant's** case was a photocopy of an undated list which the Plaintiff claimed in that case was made at that time. In **Sharda Nand v Dominion Insurance Ltd** [2000] FJHC 167 (30 June 2000) in a claim for fire damage the claimant was unable to produce any records. Nor did he call his accountant in spite of opportunity offered to do so. The Plaintiff was granted 26,665.00 although the assessors assessed the loss at \$20,178.68.

- [21] **Jaswant Lal's** case was in connection with an insurance claim on the stock in trade destroyed in the aftermath of hurricane Gavin which occurred in Ba on 7 March 1997. The stock was insured. His claim under the policy was declined. Of a claim of \$182, 513.50 the High Court has awarded a sum of \$167,303.95 which sum the Supreme Court has affirmed.
- [22] In the present case although there is some evidence of an investigation done by one Jim Ash & Associates, the contents of this report could not be accepted and is thereby rejected. There was no evidence of any investigation done or report made with regard to the damage caused. The only evidence available is that of the Plaintiff whose evidence was not rebutted. The Plaintiff has explained how he informed the Defendant, the police and fire brigade of the fire.
- [23] Whilst having a policy of \$60,000.00, the Plaintiff has claimed only \$16,000.00 for the building. The spare parts also in the building were insured for \$60,000.00 and the Plaintiff claimed a sum of \$50,000.00. The Plaintiff's evidence on this is that all the spare parts were burnt. If there was any exaggeration on this sum the Defendant would have discovered. *"The trial Judge has an obligation to assess damages in accordance with principle and if he or she is without assistance from the parties the judge must do the best he or she can on the evidence before the Court"* (**Fai Insurance (Fiji) Limited v Prasad's Nationwide Transport Express Courier Limited** (ABU 90 of 2004; 16 April 2008). Having considered the entirety of the evidence I am of the view that the learned Judge has erred in dismissing the Plaintiff's claim on the ground that there was no proof. I am of the view that on a balance of probability the Plaintiff in this case succeeds. The appeal is thus allowed and the order with regard to the dismissal of the Plaintiff's claim is set aside and the judgment is entered in favour of the Plaintiff. The Plaintiff is awarded the total sum claimed that is \$66,000.00 together with interest at 10% from the date of the claim up to the time of payment as per the Insurance Law Reform (Interest Rates) Regulations 2004, together with costs \$5000.00 payable by the Defendant/Respondent within 21 days from date of this judgment.

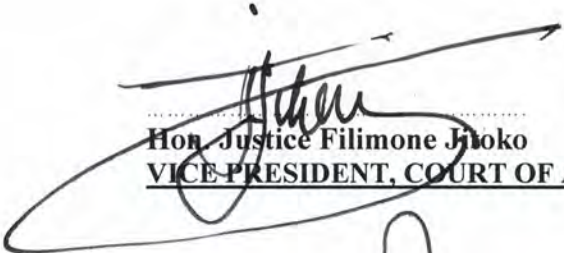


**Sharma, JA**

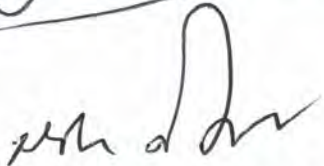
[24] I have read the entire Judgment and the reasons therein. I agree with the Judgment and the reasons accordingly.

**Orders of Court are:**


1. The Appeal is allowed.
2. The Judgment with regard to the dismissal of the Plaintiff's claim is set aside.
3. Judgment is entered in favour of the Plaintiff.
4. The Plaintiff is awarded \$66,000.00 together with interest at 10% from the date of the claim up to the time of payment as per the Insurance Law Reform (Interest Rates) Regulations 2004.
5. The Plaintiff is also awarded estimated costs in the High Court.
6. The Plaintiff/Appellant is awarded costs in a sum of \$5000.00 payable by the Defendant/Respondent within 21 days from the date of this judgment.



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**Hon. Justice Filimone Jioke**  
**VICE PRESIDENT, COURT OF APPEAL**



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**Hon. Justice Eric Basnayake**  
**JUSTICE OF APPEAL**



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**Hon. Justice Vishwa D. Sharma**  
**JUSTICE OF APPEAL**

